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# What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses

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**WHAT’S A PRESIDENT TO DO?  
INTERPRETING THE CONSTITUTION IN THE WAKE OF  
BUSH ADMINISTRATION ABUSES**

**DAWN E. JOHNSEN\***

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INTRODUCTION

President George W. Bush and his executive branch lawyers have earned widespread and often scathing criticism for their extreme positions and practices regarding the scope of presidential authority. The war on terror that followed the September 11, 2001 terrorist attacks provided the context for their most controversial claims of unilateral authority: to override legal prohibitions on the use of torture and cruel, inhuman, and degrading treatment; to hold “enemy combatants” indefinitely without access to counsel or any opportunity to challenge their detention; and to engage in domestic electronic surveillance without a court order. The administration’s efforts to expand presidential power, however, were not confined to post-9/11 national security issues; they date from President Bush’s earliest days in office and include, for example, adherence to “unitary executive” theories of sweeping presidential control of the executive branch.<sup>1</sup>

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\* Professor of Law, Indiana University School of Law – Bloomington. This Article builds upon my presentation at the Boston University School of Law conference on Presidential Power in the Twenty-First Century. I am grateful to Professor Gary Lawson, the student editors of the Boston University Law Review, and all who took part in an excellent conference. I also would like to thank Neil Kinkopf and Jeff Powell for their suggestions on a draft of this Article, and my research assistants Jeffrey Macey and Aaron Stucky for their outstanding help.

<sup>1</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY 89 (2007) (“[Vice President Dick] Cheney and the President told top aides at the outset of the first term that past presidents had ‘eroded’ presidential power, and that they wanted ‘to restore’ it so that they could ‘hand off a much more powerful presidency’ to their successors.” (citation omitted)); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 73 (2007) (describing a mandate given at the first White House

Our Nation's welfare and integrity depend upon continued evaluation, response, and, when warranted, condemnation of these practices, even beyond President Bush's time in office. The Bush administration's abuses threaten to distort presidential authority and the federal balance of powers for years and administrations to come. Motivated by this administration's actions, many commentators (including me) have proposed reforms and principles to guide future administrations and to encourage Congress and the courts to impose appropriate external checks.<sup>2</sup>

This Article, however, urges due care in the formulation of such critiques and reforms, especially regarding the Bush administration's efforts to advance its constitutional views. Critics should be precise with their objections and recommendations in order to avoid undermining future Presidents' legitimate authorities or otherwise disrupting the proper balance of governmental powers. The Bush administration's abuses – especially its claims of authority to refuse to comply with federal statutes – reinforce the need for articulated standards and effective safeguards to ensure lawful conduct. However, those abuses do not obviate the existence or desirability of legitimate presidential authority. Among the powers President Bush has placed at risk is the longstanding and necessary authority of Presidents, with the help of their executive branch lawyers, to interpret the Constitution in ways that go beyond judicial precedent and congressional determinations.

#### I. THE BUSH LEGACY FOR PRESIDENTIAL POWER

Prominent commentators have speculated with some disagreement about the likely effects of the Bush presidency on the future strength of executive power. Their assessments underscore what is at stake. Professor Jack Goldsmith, who served as a high-ranking official in President Bush's Department of Justice, has written a valuable insider's account.<sup>3</sup> Goldsmith concludes that the "harmful suspicion and mistrust" engendered by President Bush's unnecessary unilateralism – his attempts to exclude Congress and the courts – can be expected to diminish executive power.<sup>4</sup> Goldsmith notes the irony of this

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Counsel staff meeting of the Bush presidency: "They were to be vigilant about seizing any opportunity to expand presidential power. Bush had told him, [Counsel to the President Alberto] Gonzales said, that the institutional powers of the presidency had been weakened by his predecessors."); *id.* at 9 (quoting a 1996 speech by Vice President Cheney: "I think there have been times in the past, oftentimes in response to events such as Watergate or the war in Vietnam, where Congress has begun to encroach upon the powers and responsibilities of the President; that it was important to go back and try to restore that balance.").

<sup>2</sup> E.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) [hereinafter Johnsen, *Faithfully Executing the Laws*].

<sup>3</sup> See generally GOLDSMITH, *supra* note 1.

<sup>4</sup> *Id.* at 140.

prospect, given the administration's overriding goal of expanding presidential authority:

It was said hundreds of times in the White House that the President and Vice President wanted to leave the presidency stronger than they found it. In fact they seemed to have achieved the opposite. They borrowed against the power of future presidencies – presidencies that, at least until the next attack, and probably even following one, will be viewed by Congress and the courts, whose assistance they need, with a harmful suspicion and mistrust because of the unnecessary unilateralism of the Bush years.<sup>5</sup>

Due to his support of both a relatively strong presidency and many of President Bush's policy objectives,<sup>6</sup> Goldsmith laments the potential loss of some executive power even as he criticizes the Bush administration for egregious power grabs. Goldsmith maintains that President Bush would have been more successful and presidential authority more secure if, rather than repeatedly seeking to go-it-alone in secret, he had sought congressional support more often.<sup>7</sup> To support this assessment, Goldsmith cites the Supreme Court's aggressive review of the administration's unilateral policies<sup>8</sup> and Congress's general willingness to support those policies.<sup>9</sup>

*Boston Globe* reporter Charlie Savage has authored an impressively exhaustive analysis of the damage President Bush has inflicted on the balance of governmental powers.<sup>10</sup> He and Goldsmith agree on much, including the extreme nature of the Bush administration's unilateralism, which they both so ably document. In contrast to Goldsmith, Savage emphasizes that President Bush pushed the limits of executive authority in dangerous ways that likely will outlast his presidency.<sup>11</sup> They both are almost certainly right that Bush's

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<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g., id.* at 28.

<sup>7</sup> *See, e.g., id.* at 205-13 (comparing the Bush administration's "go-it-alone approach" with President Franklin D. Roosevelt's approach of broad consultation within and without his administration on wartime decisions).

<sup>8</sup> *See id.* at 134-37; *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>9</sup> GOLDSMITH, *supra* note 1, at 138-40 (discussing Congress's passage of the Military Commissions Act of 2006 and opining that the Bush administration "surely could have received an even more accommodating military commission system if they had made the push in Congress in 2002-2003 instead of the fall of 2006").

<sup>10</sup> SAVAGE, *supra* note 1, at 123 (describing the Bush administration's legal opinions as seeking to "eliminate nearly all the checks and balances that have been traditionally understood to limit the power of the president").

<sup>11</sup> *Id.* at 330 (quoting Supreme Court Justice Robert Jackson's observation in his dissent from *Korematsu v. United States*, 323 U.S. 214, 246 (1944), that any new claim of executive power "lies about like a loaded weapon ready for the hand of any authority that can bring

legacy will include lasting effects on the scope of presidential power. Whether those effects will take the form of an expansion or contraction of presidential power will likely vary with the particular issue, but I believe that Savage has identified the greater danger.

Expansions in presidential power typically prove difficult to roll back. Lawyers at the Office of Legal Counsel (OLC) in the Department of Justice are the government lawyers charged with assessing the legality of proposed executive branch action, and OLC's advice traditionally is considered binding on the executive branch unless overruled by the President or the attorney general. Savage aptly observes a tendency for OLC recognition of presidential power to act as a one-way ratchet, with OLC experiencing greater difficulty telling a President that legal obstacles prevent him from taking a desired action if one or more of his predecessors had concluded that they possessed the relevant authority.<sup>12</sup> Moreover, OLC expressly relies on a version of *stare decisis* in its legal interpretations, looking to past OLC and attorney general opinions.<sup>13</sup>

Regardless of who proves correct about the general post-Bush direction of presidential power, there is some risk that reactions to the Bush experience – public sentiment, political considerations, or mistaken constitutional understandings – might distort outcomes and harm legitimate and valuable executive powers. Commentators certainly should not mute their principled criticism, but they should avoid imprecise and over-generalized reactions that might undermine the ability of future Presidents to exercise legitimate authorities.

One particularly prominent presidential authority at risk is executive privilege, which allows Presidents to withhold certain information from Congress, the courts, and the public. Executive privilege, even at its best, is an unpopular presidential authority because its exercise comes at a very high cost: lost governmental accountability. The privilege is especially vulnerable in the wake of a President who has abused it or operated with unwarranted secrecy, both of which describe the Bush presidency. President Bush's assertions of executive privilege to withhold information regarding the allegedly improper firing of several U.S. Attorneys, coupled with his administration's pervasive secrecy, may diminish the ability of President Bush's successors to raise legitimate executive privilege claims – just as the corruption and secrecy of Richard Nixon's administration made assertion of the privilege far more difficult for his successors. Now-Justice Antonin Scalia acknowledged this Nixon legacy when, in 1975, as Assistant Attorney General for the Office of Legal Counsel, he testified before a Senate subcommittee. Commenting on

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forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”).

<sup>12</sup> *Id.* at 329.

<sup>13</sup> See GOLDSMITH, *supra* note 1, at 145.

post-Watergate legislation seeking to limit executive privilege, Scalia told the committee:

I realize that anyone saying a few kind words about Executive privilege after the events of the last few years is in a position somewhat akin to the man preaching the virtues of water after the Johnstown flood, or the utility of fire after the burning of Chicago. But fire and water are, for all that, essential elements of human existence. And Executive privilege is indispensable to the functioning of our system of checks and balances and separation of powers.<sup>14</sup>

Although I believe Presidents should be extremely reluctant to assert executive privilege and often disagree with Justice Scalia's views on separation of powers issues, his observations here convey the importance of distinguishing between the legitimacy of an executive authority and specific abuses of that authority.

This Article will focus on a second, less prominent issue of presidential authority that is at risk in the wake of the mounting and merited criticism of the Bush presidency: the President's authority to interpret the Constitution. Like executive privilege, it is an authority susceptible to grave presidential abuse. When properly exercised, however, presidential constitutional interpretation can be legitimate and valuable. Commentators should not confuse their objections to a particular President's substantive constitutional views and practices with objections to the legitimacy of the underlying presidential authority.

The risk of such conflation can be seen, for example, in a December 2007 remark by Senator Sheldon Whitehouse. Whitehouse attacked the Bush administration for asserting the position that "[t]he President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II."<sup>15</sup> Senator Whitehouse has earned commendation for his forceful and able critiques of the Bush administration's abuses. Here, too, his concern is warranted, but he seems to misplace his objections. Presidents not only can, but they must determine whether their actions are lawful (subject, of course, to appropriate judicial review). Moreover, in many circumstances, Presidents may develop, declare, and act upon distinctive, principled constitutional views that do not track those of the Supreme Court or Congress. The problem lies not with the fact that President Bush, with the help of his lawyers, assessed the scope of his constitutional authority before acting, but with the flawed content of his legal

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<sup>14</sup> *Executive Privilege – Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Ops.*, 94th Cong. 125 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel).

<sup>15</sup> Press Release, Senator Sheldon Whitehouse, In FISA Speech, Whitehouse Sharply Criticizes Bush Administration's Assertion of Executive Power (Dec. 7, 2007), available at <http://whitehouse.senate.gov/record.cfm?id=288537&>.

determinations and the ways in which he secretly acted upon them.<sup>16</sup> Such concerns with how President Bush abused his authority undoubtedly motivated Senator Whitehouse, but he chose a formulation that seemed to impugn legitimate executive authority.

The Bush administration itself is largely to blame for misplaced attacks and confusion. It has consistently engaged in excessive secrecy about the substance of its legal interpretations and has neglected to explain publicly how it views its own interpretive authority. Senator Whitehouse, for example, made his comments after reviewing OLC opinions on the legality of the Bush administration's surveillance program. The administration, however, refused to release publicly these and many other OLC opinions and sharply constrained Senator Whitehouse's ability to reveal their content as a condition of sharing them with him.<sup>17</sup>

The Bush administration's constitutional views on executive authority, as revealed, for example, in other OLC opinions that have been leaked or released under pressure, suggest likely bases for Senator Whitehouse's valid concerns. When assessing their own authority, Presidents are constitutionally obligated to act on their good faith, best interpretations of applicable legal constraints.<sup>18</sup> The Bush administration, to the contrary, has at times acted on policy preferences and a generalized desire to expand presidential power. Further, President Bush has advanced extreme constitutional positions outside the mainstream of legal thought and unsupported by judicial precedent without due consideration of whether the context affords him that authority. Most striking in this regard, President Bush has inadequately attended to the nature of the particular constitutional authority that he was exercising and to whether Congress had spoken to the issue. He has declared provisions unconstitutional with seeming equal ease whether opining on draft legislation, vetoing a bill, signing a bill into law, or declaring the authority to violate an existing statutory prohibition. Even when a President makes a sincere effort to assess the constitutionality of a legislative provision, whether he may act on that interpretation depends on the context. As previous administrations have found and past practice confirms,<sup>19</sup> presidential decisions not to comply with federal

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<sup>16</sup> For similar assessments, see Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2007/12/whitehouse-blames-white-house-but-he.html> (Dec. 8, 2007, 10:43); Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2007/12/misdirected-outrage.html> (Dec. 8, 2007, 17:03).

<sup>17</sup> See Posting of Marty Lederman, *supra* note 16.

<sup>18</sup> See Johnsen, *Faithfully Executing the Laws*, *supra* note 2, at 1576-1601 (describing the President's obligations and OLC's traditional practices and advocating principles to guide OLC's legal interpretations).

<sup>19</sup> See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 203 (1994) [hereinafter 1994 Dellinger Memorandum]; The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 55-56 (1980) [hereinafter 1980 Civiletti Memorandum].

statutes raise concerns different and far more grave than almost any other context in which Presidents advance their constitutional views.<sup>20</sup>

## II. THE BUSH ADMINISTRATION'S RECORD ON CONSTITUTIONAL INTERPRETATION

During the October 2007 confirmation hearings for now-Attorney General Michael Mukasey, it seemed the Senate might directly challenge the Bush administration's failure adequately to respect Congress and its statutes. The Senate Judiciary Committee's questions reflected concerns about the Bush administration's politicization of the Department of Justice.<sup>21</sup> Senators (including Senator Whitehouse) explored whether Mukasey, unlike his predecessor Alberto Gonzales, would appropriately advise the President of his constitutional obligation to uphold the rule of law and comply with federal statutes. Senators also questioned President Bush's use of signing statements to signal his potential noncompliance with acts of Congress he found constitutionally questionable, even as he signed bills into law.

On day two of the hearings, virtually all public attention narrowed to one explosive context in which the Bush administration had acted contrary to legal constraints: the use of extreme methods of interrogation. Mukasey jeopardized what had seemed his certain confirmation by joining the Bush administration's refusal to acknowledge the illegality of waterboarding, a long-recognized form of torture that subjects a prisoner to the terror of drowning.<sup>22</sup> The United States' use of waterboarding certainly merited outrage, for it jeopardized the Nation's moral and international standing and the safety of its military and intelligence agents abroad.<sup>23</sup> This waterboarding focus, however, eclipsed the

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<sup>20</sup> In assessing the legitimacy of the Bush administration's actions and possible lessons to be drawn from its abuses, this Article draws upon earlier articles in which I discussed presidential authority to interpret the Constitution. See generally Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004) [hereinafter Johnsen, *Functional Departmentalism*]; Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000) [hereinafter Johnsen, *Presidential Non-Enforcement*].

<sup>21</sup> *Executive Nomination: Hearing on the Nomination of Michael B. Mukasey To Be Attorney General of the United States Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

<sup>22</sup> See Dan Eggen, *Mukasey Losing Democrats' Backing; Nominee Unsure If Waterboarding Breaks Torture Law*, WASH. POST, Oct. 31, 2007, at A1; Dan Eggen, *Torture Stance Raises Doubts on Mukasey*, WASH. POST, Oct. 27, 2007, at A2; Emily Bazelon, *Rebound Relationship: The Senate Runs Into the Arms of Michael Mukasey*, SLATE, Oct. 17, 2007, <http://www.slate.com/id/2176121/>.

<sup>23</sup> One illustration of the potential damage is the Bush administration's refusal to acknowledge that waterboarding would be unlawful if used by other nations against U.S. forces abroad. See Josh White, *Evidence From Waterboarding Could Be Used in Military Trials*, WASH. POST, Dec. 12, 2007, at A4; *A Decision Was Made Not To Talk About These*



also serious concern that President Bush, with the backing of his new Attorney General, might continue to violate a range of federal statutes – and might do so in secret, thereby avoiding public accountability.

The Bush administration's extraordinary disregard of statutes, even statutes treating the issue of interrogation, was fundamentally misunderstood and misreported, indicating the state of public confusion. For example, the *Washington Post* editorialized that the Senate should confirm Mukasey but also enact new legislation prohibiting waterboarding.<sup>24</sup> Astonishingly, the editorial failed to explain that multiple international and domestic laws already criminalized waterboarding, as well as other extreme techniques that the Bush administration had utilized but that had escaped the public notoriety of waterboarding. The true problem was the Bush administration's refusal faithfully to interpret and apply those existing laws. As Georgetown law professor Marty Lederman explained, the *Washington Post's* strained effort at "Solomonic wisdom" failed utterly: waterboarding not only fell within existing prohibitions, but any new legislation faced President Bush's certain veto.<sup>25</sup>

President Bush, of course, is not the first President with an aggressive view of his own interpretive authority. Throughout history, Presidents on occasion have advanced and acted upon constitutional interpretations distinct from those of the courts and Congress, sometimes famously and momentously.<sup>26</sup> Nor is President Bush the first to allow political and policy objectives to infect his constitutional interpretations. The Bush administration, however, clearly falls at an extreme on the historical spectrum.

If anything positive can be attributed to the Bush administration's interpretive abuses, it is a heightened public awareness of the critical need for scrutiny of executive branch legal interpretations and interpretive practices. The federal government's political branches lack some of the judiciary's institutional protections and practices that help to minimize political influences on legal interpretation – such as life tenure, an adversarial system, and

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*Things*, GUARDIAN UNLIMITED, Nov. 5, 2007, <http://www.guardian.co.uk/usa/story/0,2204442,00.html> (transcript of a debate between John Bellinger, State Department Legal Advisor, and Philippe Sands, professor of law at University College London).

<sup>24</sup> Editorial, *Mr. Mukasey and Torture; The Senate Should Confirm the Former and Ban the Latter*, WASH. POST, Nov. 2, 2007, at A20. Senator Chuck Schumer similarly explained his decision to support Mukasey – support that may have been critical to his confirmation – as due to Mukasey's private assurances that if Congress enacted yet another law, this time specifically criminalizing waterboarding by name, he would urge the administration to comply. Charles Schumer, Op-Ed., *A Vote for Justice*, N.Y. TIMES, Nov. 6, 2007, at A29; see also Dan Eggen & Paul Kane, *Undecided Schumer May Be Key to Mukasey's Chances*, WASH. POST, Nov. 2, 2007, at A3.

<sup>25</sup> Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2007/11/washington-post-jumps-shark.html> (Nov. 2, 2007, 03:39). In March 2008, President Bush, in fact, did veto the new legislation endorsed by the *Washington Post*. Steven Lee Myers, *Veto of Bill on C.I.A. Tactics Affirms Bush's Legacy*, N.Y. TIMES, Mar. 9, 2008, at A1.

<sup>26</sup> See *infra* notes 58-62, 79-81, 90-94 and accompanying text.

published opinions. Executive branch legal interpretations that are unsupported by judicial precedent therefore warrant close examination. In order to help illustrate, I will briefly describe three of the Bush administration's most controversial policies: those involving torture, warrantless domestic surveillance, and signing statements.<sup>27</sup>

Perhaps most infamous, a 2002 secret OLC legal memorandum commonly known as the "Torture Memo" concluded that the President, as Commander in Chief, possessed the constitutional authority to authorize government officials to engage in torture, notwithstanding a federal statute that criminalized such action.<sup>28</sup> Jack Goldsmith, who began his service as the head of OLC about a year after the Torture Memo was issued, but before it was leaked to the public, has explained that he found it so "deeply flawed" and "sloppily reasoned" that he felt he had to either withdraw the advice or resign from OLC.<sup>29</sup> Ultimately, he did both. Goldsmith prepared a total of three letters of resignation during the nine months he served at OLC.<sup>30</sup> Goldsmith's successor at OLC, Daniel Levin, reportedly also resigned over the torture issue while working on a never-finished memo that would have imposed tighter controls on interrogation techniques.<sup>31</sup>

In December 2005, Congress responded to the leak of the Torture Memo, as well as reports of abuse at the Iraqi Abu Ghraib prison and other sites overseas, by imposing criminal penalties not only for torture but also for cruel and inhuman treatment of persons detained by the United States anywhere in the world.<sup>32</sup> OLC reportedly again issued a secret opinion interpreting the more

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<sup>27</sup> Numerous press and other commentators have provided detailed analyses of the Bush administration's abuses of its authority to interpret the law. *See, e.g.*, GOLDSMITH, *supra* note 1; SAVAGE, *supra* note 1; Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1; Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A1; Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST, June 25, 2007, at A1.

<sup>28</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002). The Bush administration disavowed the Torture Memo when it leaked to the public and OLC eventually issued a new memorandum to replace it. *See* Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to James B. Comey, Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004).

<sup>29</sup> GOLDSMITH, *supra* note 1, at 10; *see also id.* ("I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations.").

<sup>30</sup> *Id.*

<sup>31</sup> Jan Crawford Greenburg & Ariane de Vogue, *Bush Administration Blocked Waterboarding Critic*, ABC NEWS, Nov. 2, 2007, <http://abcnews.go.com/WN/DOJ/story?id=3814076>.

<sup>32</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.).

restrictive interrogation prohibition to allow the government to continue using techniques, such as waterboarding, commonly viewed as torture and cruel and inhuman treatment.<sup>33</sup> In November 2007, within a week of Michael Mukasey's confirmation, the Bush administration issued a statement of policy vowing to veto a bill aimed at clarifying which interrogation methods were prohibited.<sup>34</sup> The statement also flatly proclaimed that there was no need for any further legislation regarding interrogation.<sup>35</sup> As of March 2008, Mukasey and other administration officials continued to refuse to acknowledge the illegality of waterboarding under existing laws.<sup>36</sup> And that same month President Bush vetoed a bill that would have even more explicitly prohibited the government from using waterboarding and other extreme methods.<sup>37</sup>

The Bush administration used a similar extreme and implausible Commander-in-Chief theory as part of its justification for a second highly controversial counterterrorism practice:<sup>38</sup> years of electronic surveillance here in the United States without complying with the Foreign Intelligence Surveillance Act (FISA).<sup>39</sup> FISA allows the government secretly to request a court order, without notification of the target, from a special FISA court that almost invariably grants such requests.<sup>40</sup> For several years after 9-11, the Bush administration secretly stopped complying with even this modified court order requirement as part of what it called its Terrorist Surveillance Plan, until its

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<sup>33</sup> Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1. The administration's excessive secrecy, including its refusal to release OLC opinions and other information of great public interest, unfortunately makes necessary reliance on news reports and government leaks for the existence and content of OLC advice and other information regarding how the administration is conducting the war on terror.

<sup>34</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 4156 – MAKING EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR THE DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2008, AND FOR OTHER PURPOSES 1 (2007).

<sup>35</sup> *Id.* at 2.

<sup>36</sup> Dan Eggen, *Justice Official Defends Rough CIA Interrogations*, WASH. POST, Feb. 17, 2008, at A3; Dan Eggen, *Mukasey Hints at Wider CIA Probe*, WASH. POST, Jan. 31, 2008, at A2.

<sup>37</sup> Myers, *supra* note 25.

<sup>38</sup> See Memorandum from U.S. Dep't of Justice (Jan. 19, 2006), reprinted in David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1374 (2006).

<sup>39</sup> Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (subsequently amended by Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007)).

<sup>40</sup> See David Johnston & Neil Lewis, *Defending Spy Program, Administration Cites Law*, N.Y. TIMES, Dec. 23, 2005, at A20.

desire to avoid impending judicial review prompted it to work out a still-undisclosed, allegedly lawful arrangement with the FISA court.<sup>41</sup>

A still-secret component of this Terrorist Surveillance Plan led to one of the most shocking and colorful incidents among the Bush administration's rule-of-law abuses. When then-Acting Attorney General James Comey refused to approve the legality of this program (on the advice of Jack Goldsmith, who subsequently described the program as "the biggest legal mess I've ever encountered"),<sup>42</sup> then-Counsel to the President Alberto Gonzales and White House Chief of Staff Andrew Card did not accept Comey's determination. Gonzales and Card instead rushed to the hospital bedside of John Ashcroft, who was recovering in intensive care from surgery and had temporarily transferred his authority as Attorney General to Comey. Both Comey and Goldsmith have testified before Congress about their dramatic race through Washington, D.C., in an effort to arrive at the hospital first, out of fear that Gonzales and Card would attempt to pressure a very ill and sedated Ashcroft into authorizing the program.<sup>43</sup> They testified also that Ashcroft in the end stood firmly by Comey and Goldsmith, and President Bush ordered the program changed, but only under the intense pressure created by the threat of mass resignations from the Department of Justice leadership.<sup>44</sup>

A third and final example: President Bush has abused the presidential practice of issuing statements simultaneous with signing a bill into law. He has come under intense fire for including in signing statements an unprecedented number of objections to the constitutionality of provisions within the bills.<sup>45</sup> By one count, he had objected to the constitutionality of

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<sup>41</sup> The Bush administration and the FISA court refuse to release the details of that arrangement. Matt Apuzzo, *Secretive Spy Court Refuses to Reveal Wiretap Rules*, STAR-LEDGER (NEWARK), Dec. 12, 2007, at 6.

<sup>42</sup> *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Goldsmith Testimony*] (statement of Jack Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law School, former Assistant Att'y Gen., Dep't of Justice).

<sup>43</sup> *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? – Part IV: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Comey Testimony*] (testimony of James B. Comey, former Deputy U.S. Att'y Gen., Dep't of Justice); *Goldsmith Testimony*, *supra* note 42, at 14-15; *see also* Dan Eggen, *White House Secrecy on Wiretaps Described*, WASH. POST, Oct. 3, 2007, at A5; Dana Milbank, *Ashcroft and the Night Visitors*, WASH. POST, May 16, 2007, at A2.

<sup>44</sup> *Goldsmith Testimony*, *supra* note 42; *see also* *Comey Testimony*, *supra* note 43.

<sup>45</sup> *See, e.g.*, T. J. HALSTEAD, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 9 (2007); AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (Aug. 24, 2006); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 520

1,042 provisions by the end of 2006.<sup>46</sup> Professor Neil Kinkopf correctly observed that President Bush's objections typically took the form of a declaration that he would use the canon of statutory construction known as constitutional avoidance to interpret the statute in a constitutional manner – but that “[a]s a practical matter, this form of interpretation amounts to the same thing as an assertion that the President will not enforce or be bound by a particular provision of law.”<sup>47</sup> The Bush administration's legal analyses of the federal torture and FISA statutes similarly misused the avoidance canon and essentially declared that the President would not comply with the statutes as enacted. In addition to misusing the avoidance canon, President Bush's signing statements typically were so abbreviated and vague that the precise nature of his objections and the level of actual statutory nonenforcement remained hidden from public scrutiny.<sup>48</sup>

The Bush administration's actions have deepened public cynicism about the possibility of any principled executive branch constitutional interpretation, not

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(2005); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>46</sup> See Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 307-08 (2008); Neil Kinkopf & Peter M. Shane, Index of Presidential Signing Statements: 2001-2007, <http://www.acslaw.org/node/5309>.

<sup>47</sup> Kinkopf, *supra* note 46, at 308 n.7; see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). The most widely known and criticized example is President Bush's signing statement regarding the Detainee Treatment Act. Bush initially opposed the Act and embraced it only under intense congressional and public pressure. Bush's signing statement said: “The executive branch shall construe [the provision] relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.” George W. Bush, President, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005). For an outstanding discussion of President Bush's abuse of the avoidance canon, including as applied to the Detainee Treatment Act, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1246-50 (2006).

<sup>48</sup> The General Accounting Office sampled nineteen of Bush's signing statement objections and found that “[o]f these 19 provisions, 10 provisions were executed as written, 6 were not, and 3 were not triggered and so there was no agency action to examine.” Memorandum from Gary Kepplinger, Gen. Counsel, Gov't Accountability Office, to Robert C. Byrd, Chairman, S. Comm. on Appropriations, & John Conyers Jr., Chairman, H. Comm. on the Judiciary, *Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts* (June 18, 2007), available at <http://www.gao.gov/decisions/appro/308603.htm>.

firmly tethered to judicial doctrine. Skepticism is warranted and can help spark much-needed reform. But excessive and misguided reactions can threaten legitimate interpretive practices. For example, President Bush undoubtedly abused signing statements and as a result gave them a bad name. The American Bar Association issued a deeply critical report condemning not only President Bush's abuses, but also earlier presidential practice, including what I consider legitimate and valuable uses of signing statements to put the public on notice of the President's constitutional views.<sup>49</sup> President Bush's abuses also have led commentators to reevaluate the previously uncontroversial and routine executive branch practice of relying on the canon of constitutional avoidance when interpreting statutes that present constitutional difficulties.<sup>50</sup> Professor H. Jefferson Powell suggested that Presidents cannot be trusted to apply the canon fairly when their own power is at stake; he proposed an end to executive branch use of the avoidance canon "when the issue involves the commander-in-chief power or other questions about the separation of powers between Congress and the President."<sup>51</sup> The Bush administration's actions also have fueled arguments against the legitimacy of any presidential decision, under any circumstances, not to comply fully with a statute on the grounds it is unconstitutional.

### III. THE PRESIDENT'S INTERPRETIVE AUTHORITY

The controversies over torture, FISA, and signing statements and other issues give new urgency to longstanding, fundamental questions about the scope of the President's interpretive authority – questions that should be informed by, but not myopically focused on, President Bush's abuses. When may the President adopt a constitutional interpretation that is not directly

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<sup>49</sup> Compare AM. BAR ASS'N, *supra* note 45, at 5 ("[O]ppos[ing] as contrary to the rule of law and our constitutional system of separation of powers, a President's issuance of signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of the law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress"), with Posting of David Barron, Dawn Johnsen et al., to Georgetown Law Faculty Blog, [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (July 31, 2006) (disagreeing with the ABA's conclusion that the President must invariably either veto a bill containing an unconstitutional provision or "sign the bill and enforce the unconstitutional provisions" and identifying Bush's substantive constitutional interpretations as the true problem with Bush's signing statements), and Posting of Laurence Tribe, to Balkinization, <http://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html> (Aug. 6, 2006) ("Nothing in the Constitution's text, design, or history shows that a president's only legitimate options are either to veto an entire bill or to sign it and then enforce it in its entirety regardless of his good faith views as to the constitutional infirmities either of some part of the bill or of some distinct set of its possible applications.").

<sup>50</sup> See, e.g., Morrison, *supra* note 47, at 1189.

<sup>51</sup> H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1315 (2006).

supported by, or that even runs directly counter to, the constitutional views of the courts or Congress? The President's constitutionally prescribed oath of office,<sup>52</sup> the Take Care Clause,<sup>53</sup> and the Supremacy Clause<sup>54</sup> confirm the President's obligation to uphold the Constitution through all executive action. With regard, however, to many contested issues – the scope of the Commander-in-Chief authority,<sup>55</sup> for example, or the Fourteenth Amendment's guarantees of equal protection and liberty<sup>56</sup> – the relevant question may become which branch's constitutional view should prevail: The Court's as expressed in judicial precedent, Congress's as expressed in its legislative enactments, the executive branch's as expressed in Attorney General or OLC opinions, the sitting President's own considered views and those of the President's lawyers, or some combination?

The answer must acknowledge that a measure of independence in presidential interpretation is unavoidable. Presidents, with the help of their lawyers, daily confront issues requiring constitutional and other legal interpretation, and they often must act without the benefit of clear judicial guidance. Judicial precedent is especially scarce, and executive branch precedent particularly developed, on issues of national security and the separation of powers.<sup>57</sup> Jurisdictional requirements such as political question and standing doctrine, as well as deferential standards of review, may limit, delay or preclude judicial review. Such limits on review sometimes reflect the Court's judgment that the executive or legislative branches bring value to the interpretive enterprise and are deserving of deference. At other times, Presidents must act before the Court considers an issue. It therefore is not feasible within our system to instruct Presidents simply to implement judicial precedent and never to act upon their own interpretations.

Nor should we desire such a system. Even when the Supreme Court has spoken, the President (or Congress) may sincerely and passionately disagree: think of Abraham Lincoln's views on *Dred Scott v. Sandford*,<sup>58</sup> Franklin D. Roosevelt on Congress's authority to enact New Deal legislation, and Ronald

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<sup>52</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>53</sup> *Id.* art. II, § 3.

<sup>54</sup> *Id.* art. VI, cl. 2.

<sup>55</sup> *Id.* art. II, § 2.

<sup>56</sup> *Id.* amend. XIV, § 1.

<sup>57</sup> In his famous concurring opinion finding President Truman's wartime seizure of U.S. steel mills unlawful, Justice Robert Jackson noted the paucity of judicial doctrine on presidential authority questions:

[A] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

<sup>58</sup> 60 U.S. (19 How.) 393, 411 (1856).

Reagan on a host of issues including congressional power, federalism, abortion, and affirmative action.<sup>59</sup> In some instances, Presidents may provide valuable expertise and perspective, or simply an alternative interpretation that will inspire public debate and constitutional change. Ultimately the President's views might be incorporated into judicial doctrine, reflected in statutes, or otherwise become part of our Nation's shared understanding of constitutional meaning. There certainly are times when a majority of the Justices fail to adopt the best constitutional interpretation. Critics often vehemently disagree about which precedents count as the failures, but some decisions come to be universally condemned, such as *Dred Scott v. Sandford*<sup>60</sup> and *Plessy v. Ferguson*.<sup>61</sup> At times throughout our history, Presidents have stood among the most important contributors in the ongoing debate about how best to interpret and apply the Constitution's core contested provisions.

The better question, therefore, is not whether, but how the President should participate in the determination of constitutional meaning. Contrary to President Bush's indiscriminate approach, legitimacy depends on the circumstances, and especially on which constitutional authority the President is exercising to promote his distinctive interpretation. With regard to some authorities, Presidents possess broad discretion to act based upon constitutional views they sincerely hold and desire to promote. They may veto bills, recommend legislation, pardon convicts, file legal briefs, nominate judges, make speeches, write articles – all premised on their own constitutional interpretations. Presidents Franklin D. Roosevelt and Ronald Reagan, for example, both legitimately used many of these authorities to promote radical changes in prevailing constitutional doctrine on pressing issues of the day, though of course their constitutional visions differed dramatically.<sup>62</sup>

If President Bush had confined the promotion of his extreme executive authority positions to these highly discretionary authorities – using, for example, the bully pulpit to make the case for broadened Commander-in-Chief authority in the war on terror or litigation to urge the Court to defer to his military determinations – he undoubtedly still would have provoked controversy. But the controversy would have centered on the substance of his views, which could have been publicly debated, and less on the legitimacy of the authorities he used to advance and implement those views. Instead, the

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<sup>59</sup> See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 370-77, 383-405 (2003) [hereinafter Johnsen, *Presidential Influences*].

<sup>60</sup> 60 U.S. (19 How.) at 411.

<sup>61</sup> 163 U.S. 537, 538 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

<sup>62</sup> See Johnsen, *Presidential Influences*, *supra* note 59, at 370-77, 383-405. Other Presidents typically cited as supporting relatively strong executive authority to act on distinctive constitutional views include Thomas Jefferson, Andrew Jackson, Andrew Johnson, Abraham Lincoln and Richard Nixon. See Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 19-21; *infra* text accompanying notes 79-81.



Bush administration repeatedly has acted in the context most difficult to justify: claiming the authority to act contrary to the dictates of federal statutes. And in at least several notable cases, the administration sought to keep those very claims secret.

#### IV. THE PRESIDENT'S NONENFORCEMENT AUTHORITY

In addition to general questions of interpretive authority, President Bush's policies squarely raise the perhaps surprisingly unsettled and nuanced issue: when, if ever, may the President decline to comply with a federal statute? One common response is the one Senators unsuccessfully sought to elicit from Attorney General Michael Mukasey during his confirmation hearings: the President is obligated to comply with all laws passed by Congress and signed into law; presidential disclaimers in signing statements to the contrary are entirely and invariably illegitimate. Senators were clearly right to condemn the Bush administration's unjustified violations of federal statutes and to seek a dramatic shift in attitude from Alberto Gonzales' successor. But Mukasey also was right to avoid an unqualified statement that Presidents must always enforce statutes as enacted. The correct answer to this enduring question is just not that simple.

As Mukasey appropriately noted, some statutes fail to comply with the Constitution, which the President also is obligated to uphold. On occasion, such conflicts call upon Presidents to make difficult judgments that could profoundly affect vital national interests such as national security or fundamental liberties. Neither Mukasey in his testimony, nor the Bush administration, however, has detailed how they believe the President should resolve perceived conflicts between the Constitution and statutes. Despite President Bush's unprecedented objections to the constitutionality of statutory provisions, the Bush administration has never explained its view of the nature or extent of the President's nonenforcement authority. Nor has it expressly disavowed the dominant executive branch tradition and practice that recognizes only highly limited nonenforcement authority, an approach that OLC most recently embraced and embodied in detailed guidelines in 1994.<sup>63</sup>

Although the Bush administration has not publicly replaced the 1994 nonenforcement guidelines, its actions have demonstrated unambiguously that it does not believe the President's nonenforcement authority is so limited. Implicit in some Bush administration actions and OLC opinions is the position that the President may go as far as to act contrary to any statute that he believes violates the Constitution. This resolution, like the other extreme of invariable mandatory statutory enforcement, has superficial appeal: the Constitution of course is supreme law<sup>64</sup> that the President is obligated to uphold, including by oath of office.<sup>65</sup> But an approach that sanctions routine nonenforcement of

<sup>63</sup> 1994 Dellinger Memorandum, *supra* note 19, at 203.

<sup>64</sup> U.S. CONST. art. VI, cl. 2.

<sup>65</sup> *Id.* art. II, § 1, cl. 8.

arguably unconstitutional statutes would, like mandatory enforcement, oversimplify the President's constitutional obligation by ignoring competing constitutional values and longstanding practice.<sup>66</sup> Moreover, routine nonenforcement dangerously and irresponsibly aggrandizes presidential power.

At the close of Bill Clinton's presidency, I wrote an article in which I explained why, despite their superficial appeal, neither of the approaches at the extremes – mandatory statutory enforcement or routine nonenforcement – comports with the Constitution's text or structure or with executive branch practice.<sup>67</sup> I concluded that the Constitution is best interpreted as creating a strong but not irrebuttable presumption in favor of enforcement of constitutionally objectionable statutes. Attorney General Benjamin Civiletti described this strong presumption well, stating "it is almost always the case that [the Attorney General] can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."<sup>68</sup>

To identify those rare cases in which nonenforcement is justified requires "the President to make sometimes difficult evaluations that depend on the specific statutory provision and the circumstances surrounding its enactment."<sup>69</sup> I developed a framework for making nonenforcement decisions that addresses both the broad theoretical principles and the specific practical factors that should guide particular decisions.<sup>70</sup> I will not repeat that analysis

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<sup>66</sup> Some support for routine nonenforcement authority may be found in the legal memoranda, though not the practice, of President George H.W. Bush's administration. See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. Off. Legal Counsel 18, 31-36 (1992); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. Off. Legal Counsel 37, 46-52 (1990). See generally Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>67</sup> See Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 10-11; see also Johnsen, *Functional Departmentalism*, *supra* note 20, at 108 (arguing for a "functional departmentalist" approach that posits "that determinations about interpretive authority require close attention to the particular constitutional question at issue and the context in which it arises").

<sup>68</sup> 1980 Civiletti Memorandum, *supra* note 19, at 55.

<sup>69</sup> Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 10; see also David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 65 (2000).

<sup>70</sup> See Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 52-54. Prior administrations have identified as among the most relevant factors whether the statutory provision was clearly unconstitutional, whether nonenforcement would increase the prospect of judicial review of the provision's constitutionality, and whether the provision encroached upon executive authority. See 1980 Civiletti Memorandum, *supra* note 19; 1994 Dellinger Memorandum, *supra* note 19. I previously assessed these three factors and developed a series of six questions to guide particular nonenforcement decisions: (1) How clear is the law's constitutional defect?; (2) Does the President possess institutional expertise relevant to the constitutional issue and what are the relative interpretative abilities of the three branches?; (3) Did Congress actually consider the constitutional issue when enacting the

here at any length, but will draw upon it to evaluate the Bush administration's performance.

Two principles should guide Presidents and their lawyers when contemplating executive interpretive authority, particularly when confronting constitutionally objectionable statutes. Both principles follow from the President's obligation to "preserve, protect and defend"<sup>71</sup> the Constitution as supreme law and to "take Care"<sup>72</sup> that the executive branch faithfully upholds it. And both principles confirm that, contrary to suggestions from the Bush administration, this obligation is not best understood as allowing Presidents to act routinely on their own interpretations of the Constitution, particularly in the context of statutory nonenforcement.

First, Presidents should premise action on their own distinctive interpretations only in ways that will promote the Constitution as best interpreted, and not merely their own preferred constitutional interpretations. The Constitution is distinct from the President's constitutional interpretations, just as it is distinct from judicial doctrine.<sup>73</sup> Presidents can be expected to misinterpret the Constitution no less (indeed far more) than the Supreme Court. A fundamental premise of our constitutional culture is that the courts play a special role in constitutional interpretation, and for good reason – including because they enjoy greater protections than the political branches against the corrupting influences of narrow political and policy objectives. The President should act with due humility and a recognition that the President is but one participant – certainly an important one – in the process of achieving the best interpretations of the Constitution. The President, therefore, should afford due deference to judicial doctrine, while recognizing that doctrine itself sometimes contemplates and ultimately benefits from distinctive presidential interpretations. The President also should respect the expressed views of Congress and adhere to the well-established presumption of the constitutionality of statutes. When Presidents do act upon their independent

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law?; (4) What is the likelihood of judicial review and how would nonenforcement affect that likelihood?; (5) How serious is the harm that would result from enforcement?; and (6) Is repeal of the statute or nondefense of the statute against legal challenge an effective alternative to nonenforcement? *See id.* at 43-54. In this discussion, I focus on the first factor.

<sup>71</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>72</sup> *Id.* art. II, § 3.

<sup>73</sup> Clearly a President may not distort constitutional meaning to serve desired policy ends through action premised on constitutional arguments that he believes to be merely plausible. Even beyond that, he may not always act upon sincerely held constitutional views. For a more detailed discussion of the constitutional obligation of Presidents and their lawyers to strive for "accurate and honest appraisal[s] of applicable law, even if that advice will constrain the administration's pursuit of desired policies," see Johnsen, *Faithfully Executing the Laws*, *supra* note 2, at 1580-82 (citing WALTER E. DELLINGER, DAWN JOHNSEN ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), reprinted in 54 UCLA L. REV. 1559 app. 2, at 1604).

constitutional interpretations, adherence to appropriate processes in the formulation and announcement of those views is critical to safeguarding against policy preferences infecting principled interpretation. In the end, what this first principle means for the President's interpretive authority – how the President can best contribute to the development of constitutional meaning – will vary with context. At a minimum, the shared and collaborative nature of the interpretive enterprise requires the President to explain publicly and with detailed reasoning any actions premised on constitutional views that conflict with those of Congress or the Court.

Second, the President must respect the constitutional functions of the other branches of government. In considering whether and how to promote distinctive constitutional views, the President must not impermissibly infringe upon the Supreme Court's judicial power or Congress's legislative power.<sup>74</sup> For example, if Presidents were to refuse to comply with a court order whenever they disagreed with the court's constitutional analysis, the judiciary's core function would be gravely impaired. Longstanding practice and academic commentary almost universally condemn presidential defiance of a court order, even when the President's constitutional disagreement is principled and sincere.<sup>75</sup> Although not quite as likely to be unsupportable as the violation of a court order, a presidential refusal to enforce a federal statute is highly suspect. The Constitution sets forth a detailed process for lawmaking, a "single, finely wrought and exhaustively considered, procedure,"

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<sup>74</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 696 (1988) ("[T]hese features of the Act . . . ensure that the President is able to perform his constitutionally assigned duties."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986) ("[T]he separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch."); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) ("[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

<sup>75</sup> President Abraham Lincoln captured well the distinction between, on the one hand, the obligation to comply with a court order and, on the other hand, the authority to act in other contexts on a constitutional understanding that is counter to that announced by a majority of Supreme Court Justices. Lincoln was speaking not of presidential authority, but the analogous authority of a member of Congress to legislate based on independent constitutional interpretations, in particular contrary to the Court's *Dred Scott* decision:

I have expressed heretofore, and I now repeat, my opposition to the *Dred Scott* decision, but I should be allowed to state the nature of that opposition . . . . What is fairly implied by the term Judge Douglas has used "resistance to the decision?" I do not resist it. If I wanted to take *Dred Scott* from his master, I would be interfering with property . . . . But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should . . . . [W]e will try to reverse that decision.

Senator Abraham Lincoln, Address in Chicago (July 10, 1858), in *THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858*, at 36 (Paul M. Angle ed., 1991).

that contemplates presidential involvement prior to enactment to ensure the constitutionality of legislation.<sup>76</sup> Presidents should work with Congress to correct constitutional problems in draft legislation, veto unconstitutional bills whenever possible, and also work with Congress to repeal and correct unconstitutional provisions. If, instead, Presidents were routinely to disregard laws they found constitutionally objectionable, they would circumvent this legislative process and threaten Congress's core legislative authority.

These principles establish a strong presumption against presidential nonenforcement, but they do not preclude it in all circumstances. The strongest context for legitimate nonenforcement occurs when Congress enacts statutory provisions that are blatantly unconstitutional under governing Supreme Court precedent. Congress, for example, has repeatedly passed provisions that purport to give to congressional committees or a single House of Congress powers that the Court expressly held, in its well-known *Chadha* decision, must be exercised by Congress as a whole, consistent with the constitutionally prescribed process for lawmaking.<sup>77</sup> Again, Presidents should veto unconstitutional bills, but most statutory provisions are not presented for the President's consideration as stand-alone provisions. When Congress presents a *Chadha* violation or other unconstitutional provision as a small part of an important omnibus bill such as an agency appropriation or program authorization, one among perhaps many hundreds of provisions, a presidential veto may be exceedingly, even prohibitively, costly. As a matter of practice, when Congress has not heeded presidential requests to correct clearly unconstitutional provisions prior to presentment, Presidents often have signed such legislation into law and announced in signing statements that they will not comply with the unconstitutional portion of the statute. Similarly, Presidents stop enforcing laws already on the books that are analogous in relevant respects to laws the Supreme Court has declared unconstitutional. Here, nonenforcement does not promote distinctive presidential interpretations, but enforces settled Supreme Court doctrine.<sup>78</sup>

The Bush administration, of course, has not simply applied settled judicial doctrine and refused to enforce clearly unconstitutional statutes, but has sought to expand presidential power far beyond what the Court has recognized. This fact, though highly relevant, does not alone render President Bush's actions clearly illegitimate. In several extraordinary cases, history has vindicated decisions by Presidents to act in advance of the Court, to violate statutes that

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<sup>76</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>77</sup> *See id.* at 958.

<sup>78</sup> As Professor Neil Kinkopf has observed: "Congress has enacted hundreds of legislative vetoes since *Chadha*, and not even members of Congress expect the President to veto such legislation or to enforce the patently unconstitutional legislative veto provisions." Neil Kinkopf, *Signing Statements and the President's Authority To Refuse To Enforce the Law*, ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS, Spring 2007, at 5, 7, available at <http://www.acslaw.org/node/2965>.

the Court only later recognized as unconstitutional. President Thomas Jefferson, for example, declared the Sedition Act of 1798 unconstitutional a century and a half before the Supreme Court expressly agreed with him; based on his then-controversial interpretation, President Jefferson pardoned all those convicted and refused to initiate any new prosecutions.<sup>79</sup> Andrew Johnson was impeached in part for firing the Secretary of War based on a constitutional interpretation with which the Court finally agreed almost sixty years later.<sup>80</sup>

The history of *Chadha*-type violations itself includes an historic example of a President who, confronted with a constitutional question years before the Court, signed a bill into law notwithstanding his view that it contained an unconstitutional provision. More than four decades before the Court decided *Chadha*, Congress presented President Franklin D. Roosevelt with a bill that included a provision authorizing Congress to rescind specified authorities granted to the President by concurrent resolution (that is, without presentment to the President for signature). Although he believed the provision violated the Constitution, an interpretation with which the Court ultimately agreed in *Chadha*, President Roosevelt felt compelled not to exercise his veto because the objectionable provision was part of the Lend Lease Act, which he believed was critical to the early World War II efforts of the Allies. President Roosevelt signed the Lend Lease Act and asked his Attorney General Robert Jackson to write a memorandum memorializing Roosevelt's constitutional concerns.<sup>81</sup>

When I addressed this issue back in 2000, my principal case study was one of the most difficult such decisions of Bill Clinton's presidency: to sign into law and then enforce the National Defense Authorization Act of 1996, which included a provision that directed the President to discharge from the military all individuals infected with the human immunodeficiency virus (HIV).<sup>82</sup> The HIV provision was part of an omnibus bill, and Congress appeared to pay little attention to it prior to enactment. The bill's House sponsor tacked the provision on late in the legislative process for the stated, and entirely mistaken, reason that HIV is invariably contracted through misconduct in violation of the Uniform Code of Military Justice: illegal drug use, homosexual activity, or sex with prostitutes. President Clinton believed this stated purpose was not only misguided, but also illegitimate, and that to enforce this provision would violate the equal protection rights of the more than one thousand armed forces

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<sup>79</sup> See Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 20.

<sup>80</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926); Cong. Globe, 40th Cong., 2d Sess. 200 (1868).

<sup>81</sup> Interestingly, Jackson did not share Roosevelt's view that the provision was unconstitutional. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1354-57 (1953).

<sup>82</sup> See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328 (1996) (repealed 1996 and codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)). For a more detailed analysis of this example, see Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 7-8, 54-60.

members who would be discharged. He also believed it would diminish military effectiveness. Clinton initially vetoed the bill, but when Congress passed it a second time, still including the HIV provision, Clinton felt he could not afford to veto it again because it appropriated 265 billion dollars for military programs “of great importance” to national security.<sup>83</sup> Instead, he issued a signing statement to publicly describe his constitutional concerns and declare his intentions: he would work with Congress to repeal the provision before its effective date and if that failed, he would reluctantly enforce the provision but not defend it in the litigation that was certain to ensue.<sup>84</sup> Ultimately, the repeal effort was successful and Clinton did not have to discharge anyone.<sup>85</sup>

In comparison with the prevailing norms and practices of long history, President Bush’s failures are evident and glaring. First, however, it should be noted that some of President Bush’s constitutional objections expressed in signing statements have been in the mainstream of presidential practice. For example, as of 2006, President Bush had objected to 235 provisions that contained legislative vetoes that were unconstitutional under *Chadha*.<sup>86</sup> Some critiques, such as that of the American Bar Association, have failed to articulate clearly and fully the proper use of signing statements and instead have sweepingly condemned their use, by this or any administration, to express constitutional objections.<sup>87</sup> This misdirected criticism could have the unfortunate result of chilling a legitimate presidential practice by which the public gains information about executive branch positions – which is particularly valuable with a highly secretive administration. For example, presidential candidate John McCain announced in February 2008 that if elected, he would “never, never, never, never” issue a signing statement,<sup>88</sup> which is not the appropriate remedy for what is a genuine problem. Even if they were to end entirely the practice of publicly announcing constitutional

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<sup>83</sup> See Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS: WILLIAM J. CLINTON 226, 227 (1996).

<sup>84</sup> *Id.* at 227; see also White House Press Briefing by Jack Quinn, Counsel to the President, and Walter Dellinger, Assistant Attorney Gen. (Feb. 9, 1996), 1996 WL 54453 (describing the President’s planned approach).

<sup>85</sup> See Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321-30. To complicate matters, if President Clinton had not been successful in repealing the provision, his back-up plan to refuse to defend the provision against the certain constitutional challenge would have been an imperfect solution. A reviewing court probably would have upheld the provision under the deferential standard of “rational basis” review and the presumption of constitutionality of federal statutes. For more discussion of this point, see Johnsen, *Presidential Non-Enforcement*, *supra* note 20, at 55-57.

<sup>86</sup> Kinkopf, *supra* note 46, at 312.

<sup>87</sup> AM. BAR ASS’N, *supra* note 45.

<sup>88</sup> Michael Abramowitz, *On Signing Statements, McCain Says “Never,” Obama and Clinton “Sometimes,”* WASH. POST, Feb. 25, 2008, at A13.

objections in signing statements, Presidents could continue to act contrary to statutes in secret.

That said, measured against the twin principles of promoting the best constitutional interpretations and respecting the constitutional functions of the other branches, the Bush administration has failed utterly. President Bush has abused signing statements at the expense of the constitutionally preferred methods of working with Congress to remedy constitutional problems prior to presentment and, where that fails, seriously considering the possibility of a presidential veto. Moreover, President Bush's signing statements, very far from only identifying clearly unconstitutional provisions, often advance unconventional and extreme views of presidential power that do not justify presidential nonenforcement of a duly enacted provision of law. On 363 occasions President Bush objected to provisions that he found might conflict with the President's constitutional authority "to supervise the unitary executive branch."<sup>89</sup> In numerous other statements he declared that he would interpret provisions to be consistent with his authority as Commander in Chief. These examples reveal another serious problem with President Bush's use of signing statements, one that complicates evaluation of his performance: President Bush's signing statements typically are so brief and formulaic that they do not actually reveal the nature of his objection or plans for (non)enforcement.

The Bush administration's "unitary executive" and Commander-in-Chief theories, in my view, are clearly wrong and threaten both the constitutionally prescribed balance of powers and individual rights. In any event, they do not provide a legitimate basis for the extreme step of statutory nonenforcement. In order to understand, however, what President Bush is saying in his signing statements, one has to be familiar with his constitutional views as revealed elsewhere – not an easy task with an administration shrouded in secrecy. President Bush's violations of FISA and statutes that prohibit torture and other extreme interrogation methods are known to the public only because of leaks. The administration continues to keep secret much of its legal analyses of those issues, and possibly of many other vital issues. Congress cannot adequately perform its constitutional legislative function if the President refuses to explain fully the basis for his claimed authority to refuse to enforce statutes as enacted, or even to notify Congress that he is not enforcing the law. And the President cannot justify executive action premised on distinctive presidential views as contributing to the development of constitutional meaning if he refuses to share and debate the substance of his constitutional views with Congress and the American people.

Most fundamental, the processes by which the Bush administration has formulated and promoted some of its most consequential constitutional positions, especially on matters of national security, reflect a profound disrespect for Congress and the laws it has enacted in conformity with the

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<sup>89</sup> See Kinkopf, *supra* note 46, at 312.



Constitution and on behalf of the American people. Such disrespect would be irresponsible regardless of the method by which an administration sought to promote its distinctive legal views, even if only in public speeches; it is indefensible when an administration seeks to justify the extraordinary authority to refuse to enforce a duly enacted statutory limitation on executive action.

Unlike President Bush, prior Presidents who strongly advocated a measure of executive interpretive independence typically spoke directly and publicly to the issue and worked with Congress. Jefferson's unilateral halting of prosecutions under the Sedition Act of 1798 was a temporary measure, for the Act soon expired and Congress agreed with Jefferson and declined to reauthorize it.<sup>90</sup> Some within and without the Bush administration cite the actions of Abraham Lincoln and Franklin Roosevelt as precedent for claims of emergency powers, but as Jack Goldsmith explains, unlike Bush, neither Lincoln nor Roosevelt were "executive power ideologues" with an "underlying commitment to expanding presidential power."<sup>91</sup> Rather, Lincoln and Roosevelt typically sought public and congressional support (albeit occasionally after the fact) for the aggressive actions they thought necessary to preserve the Union and save the world from totalitarianism, respectively.

As Jack Goldsmith, Charlie Savage, and others have documented, President Bush sought instead to go it alone at every turn, in maximum secrecy, and not only as an interim, emergency measure. He sought congressional authorization and necessary changes in existing legislative limits only when forced by the Supreme Court. President Bush, and even more, Vice President Cheney, entered office with an agenda to leave the presidency stronger than when they took office, to remedy what they perceived as an inappropriate diminishing of presidential power in response to President Nixon's abuses of power.<sup>92</sup> That agenda drove and infected the Bush administration's legal interpretations and undermined its commitment to the rule of law.<sup>93</sup>

Nixon actually is the most relevant precedent here, for his views on the scope of executive authority certainly are far closer to those of the Bush administration than were the views of the Presidents the Bush administration understandably prefers to cite. Nixon famously said in an interview after he left office, "when the President does it that means that it is not illegal":

If the president, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one

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<sup>90</sup> JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 226-29 (1951); *id.* at 231 (Jefferson declared that he considered that law "to be nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image").

<sup>91</sup> GOLDSMITH, *supra* note 1, at 89.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 80-90, 205; SAVAGE, *supra* note 1, at 73.

that enables those who carry it out, to carry it out without violating a law.<sup>94</sup>

The Bush administration's aggressive views of presidential power are a bit more subtle than so directly claiming that the President may simply disregard laws on the grounds of protecting national security interests, but they effectively achieve the same end. The Bush approach has been to press executive branch lawyers for "forward-leaning"<sup>95</sup> legal advice on national security matters, and in particular for interpretations of the President's Commander-in-Chief and other constitutional authorities, to empower the President to act contrary to federal statutory requirements. It is ironic that Bush administration officials, from the earliest days in office, embarked on a mission to reclaim sweeping presidential power they viewed as improperly lost after Nixon, but ultimately may have jeopardized legitimate presidential authorities.

#### CONCLUSION

The harm to the rule of law that our Nation has endured during the Bush presidency has inspired desperately needed reexamination of fundamental questions of presidential authority, including the authority to interpret the Constitution. The Bush administration's excessive and illegitimate claims of nonenforcement authority, the most difficult of contexts, present a serious challenge for the future of executive authority. Bush has demonstrated the fatal weaknesses of routine nonenforcement, strengthened the hand of those who argue for mandatory enforcement, and posed a serious challenge to the past practice of even rare use of nonenforcement authority because of its indeterminacy and demonstrated potential for abuse. In the end, I continue to believe that our Constitution is best served by our Nation's past practice of allowing presidential nonenforcement of constitutionally objectionable statutes but only in rare and exceptional circumstances. The lesson we should draw from the Bush administration is not that we should dramatically alter our understanding of longstanding presidential authorities. Rather, it is the urgent need for more effective safeguards and checks from both within and without the executive branch to preclude any future recurrence of the Bush administration's appalling abuses.<sup>96</sup>

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<sup>94</sup> Interview by David Frost with Richard Nixon (May 19, 1977), *reprinted in* N.Y. TIMES, May 20, 1977, at A16.

<sup>95</sup> Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004 (quoting former associate White House counsel, Bradford Berenson); Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, at 11.

<sup>96</sup> For suggestions along these lines, see Johnsen, *Faithfully Executing the Laws*, *supra* note 2, at 1579-1601.